BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

CASE NO. 00-06

[redacted]

VS.

GIBSON COUNTY SCHOOL SYSTEM

FINAL JUDGMENT

A Due Process Hearing was held on June 29, 2000 through July 1, 2000 before James Stephen King, Administrative Law Judge, sitting for the Tennessee Department of Education.

Procedural History

Upon requesting the Due Process Hearing, the Student identified the following issues:

1. Whether Gibson County High School ("GCHS") has refused to implement the recommendations made by Mary Lou Lane of the Star Center in her assisted technology evaluations dated September 12, 1999 made for Student.

2. As of January 5, 2000, GCHS has failed to pay for the Star Center evaluation contrary to Student's IEP dated August 26, 1999.

3. GCHS has refused to pay for classes for Student at Sylvan Learning Center to help his reading comprehension. The Student has benefitted significantly from his instruction at Sylvan, the School has failed to provide a reading comprehensive

program that is comparable to Sylvan Learning Center or in any way sufficient for the Student's need.

4. GCHS has committed numerous procedural violations by preparing IEPs which do not conform with Federal and State requirements.

5. GCHS has failed to provide sufficient tutoring for Student's needs.

On May 4, 2000, a consent order was entered which dismissed all issues pertaining to the implementation of the Star Center Evaluation report dated September 12, 1999 with the exception of the recommendation for continuing of after-school tutoring at Sylvan Learning Center.

It was the Administrative Law Judge's understanding that after entry of the Consent Order the remaining issue for trial at the due process hearing was reimbursement for Sylvan Learning Center and whether the School System should provide Sylvan Learning Center in the future.

Shortly before the due process hearing, the Student in his pre hearing brief and response to Gibson County pre-hearing brief, stated that he no longer sought future tutoring at Sylvan Learning Center and requested that School System be ordered to pay for a Lindamood-Bell Phonemic Awareness and Reading Comprehension Program. The School System responded that it was surprised by the request for Lindamood-Bell and requested a continuance. The School System was offered an opportunity to continue the matter for one week to allow the School System's witnesses to review the Lindamood-Bell request; however, the parties decided to proceed with the due process hearing as scheduled.

At the due process hearing, the petitioner identified three issues to be decided at the hearing:

1. Whether the School System is required to reimburse the Petitioner for the costs of services obtained from Sylvan Learning Center in Jackson, Tennessee.

2. Whether the School System has committed any actionable *procedural* violations.

3. Whether the School System has failed to provide tutoring services designed to meet the Student's educational needs.

Facts

A. The Student

The Student is 16 years old and currently enrolled in GCHS and will begin the 11th Grade for the 2000/2001 school year.

The Student has had numerous evaluations by medical practitioners (see Exhibit 1). The professionals have diagnosed the Student with Tourett's Syndrome and dyslexia (ex 1. BD0084). Numerous IQ tests have been performed. Psychologist Kimberly Hilton performed an intelligence test (WISC-III) in 1995 and determined that the Students full scale IQ was 90 in the low average range. In 1996, the Bowling Center for Development Mental Disabilities performed the Wechsler Intelligence Scale for Children III and obtained a full scale IQ of 78 (plus/minus 4). The Student's expert, Dr. Judith Wiess, and obtained a score of 85. The School System's expert, Dr. Thomas Oakland, performed a Woodcock Johnson Test of Cognitive Ability and produced a standard score of 76. Doctors Oakland and Wiess testified that there were no

statistical differences in their findings concerning Student's inabilities. Testimony establishes that the Student's intellectual functioning is in the low average range.

The Student was described by all witnesses as a polite, respectful young man who generally cooperates with his teachers. There was some insinuation by Dr. Oakland and the School System that the Student was not putting forth his best effort. The Student is involved in the regular academic curriculum as modified by his IEP, plays football and on Wednesday nights attends Sylvan Learning Center located in Jackson, Tennessee. It takes approximately 4 to 5 hours to make the drive to Sylvan Learning Center, complete the course and return home. Based on the testimony, it appears that the Student puts forth the effort that one would expect from a teenage high school student.

During the Student's 7th Grade School Year, the School System developed an IEP for the Student that provided one hour per day of Special Education Resource assistance in reading, math and language and (at the Parent's request) 2 hours per week of after-school tutoring at Sylvan Learning Center, as well as classroom modifications and accommodations. (Ex. 1, BD 0135-BD 0138). The School System also purchased a new lap top computer for the Student and he received instruction in keyboarding skills 5 times per week from his teacher. Apparently the lap top computer did not serve its function because the Student would not bring the computer to class, stating that he had lost it or left it at home. The Student completed the 7th Grade passing all courses, earning three B's, three C's and one D.

During the Student's 8th Grade School Year, the School System declined to offer Sylvan Learning Center. The School System did provide a total of 13 hours per week of

individual tutoring to the Student. Ms. Sheila McCaslin provided 1 hour per day tutoring on homework assignments and computer skills. Ms. Emily Parks provided the Student with individual tutoring and homework assistance 5 times per week during study hall. Ms. Patty Douglas, a certified math teacher, was hired by the School System to provide 3 hours per week of individual tutoring in math. The mother continued to provide Sylvan Learning Center at her own expense. The Student completed the 8th Grade earning 1 A, 2 B's and 4 C's.

During the Student's 9th Grade year, the Mother continued to request that the School System provide after-school tutoring at the Sylvan Learning Center. The School System provided written notice that it was refusing to pay for Sylvan Learning Center. The School System investigated the program offered at Sylvan Learning Center. Although Sylvan Learning Center was somewhat reluctant to provide full descriptions of its program, the School System attempted to set up a similar program at the school. The School System purchased the Steck -Vaughn curriculum which the School System contends was comparable to the curriculum used by Sylvan Learning Center. The Student attended three tutoring sessions with the School System then stopped participating in the tutoring program. The Parent continued to provide Sylvan Learning Center tutoring at her own expense. The Student passed the 9th Grade.

During the 10th Grade year the School System developed a proposed IEP that offered one hour per week of after-school tutoring for Algebra I and general English with Ms. Patti Douglas, consultative assistance for biology, in addition to classroom modifications and accommodations. The Parent continued to provide tutoring on Wednesday night at Sylvan Learning Center for the Student.

B. Sylvan Learning Center

The Sylvan Learning Center is a private company which provides educational instruction to the public for a fee. It is not accredited by the state and does not receive any public funds. The instructors are not certified in special education. Sylvan Learning Center was reluctant to describe in great detail its course material. It appears that the Student was in the academic reading program. Sylvan Learning Center provides individualized instruction by its personnel to the student using its proprietary teaching materials. The students are plugged into the program based on their current functioning. Christy Glen, Sylvan's Director of Education described the method as a recipe or formula. As the student masters new skills, he or she progresses through the program.

CONCLUSIONS OF LAW

The Individuals With Disability Act ("IDEA") and State law requires that the School System provide a free, appropriate public education ("FAPE") to the Student by developing an IEP that is reasonably calculated to confer educational benefit to him. See, Bd. of Educ. of the Hendrick Hudson School Dist. v Rowley, 458 U.S. 176 (1982). School systems are not required to maximize the educational benefit or guarantee any specific level of academic performance. Rowley @ 197. In analyzing the language of the Tennessee State statute the Federal Court in Doe v Tulahoma City Schools, 9 F. 3d 455 (6th Cir. 1993), stated that schools are not required to maximize a Student's potential.

The Doe court has developed a colorful metaphor to describe the FAPE standard:

> The Act requires that the [school district] provide the educational equivalent of a serviceable Chevrolet to every handicapped student . . . [T]he [school district] is not required to provide a Cadillac . . .
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> Doe v. Tullahoma City Sch., 9 F.3d 455 (6th Cir. 1993)

The task at hand is to determine if the Student has received a serviceable Chevrolet, if so the School System has complied with the Act.

The U.S. Supreme Court has developed a two-prong test for determining the appropriateness of the proposed IEP. Rowley, supra. First the IEP must be substantively appropriate by offering goals and objectives that are reasonably calculated to provide educational benefit to the Student and second, the procedural safeguards of the Act must be provided to the parents, including the right to participate in the development of the IEP, to receive notification and explanation of their rights.

A. Reimbursement for Sylvan Learning Center

The main dispute between the School System and the Parent for several years has been the provision of Sylvan Learning Center tutoring to the Student. The School System provided tutoring at the Sylvan Learning Center during the Student's 7th grade school year. The Parent has provided Sylvan Learning Center in the years following; however, they have requested that the School System provide such tutoring. The Parent is now requesting reimbursement for Sylvan Learning Center for the years that the Parent has provided the service. Surprisingly, the Parent is not requesting future Sylvan Learning Center since the Parent's own expert, Dr. Judith Weiss, Ph.D., testified that the Sylvan Learning Center did not provide the type of program the Student needed nor was it ever the type of program the Student needed.

The School System and the Parent are both in agreement on one issue that the Student requires tutoring, in addition to his regular academic program. Pursuant to the Student's IEP, the School System has provided tutoring services to the Student with its personnel, except for one year, when it paid for Sylvan Learning Center's tutoring program. The Parent contends that the School System failed to provide a reading comprehension program that is comparable to Sylvan Learning Center or in any way sufficient to meet the Student's need. The Parent contends that the School System officials unilaterally denied services of Sylvan Learning Center and controlled the IEP team process in such a manner that the IEP team would not provide Sylvan Learning Center because of the cost of the services. The School System contends that it is not required to provide tutoring through Sylvan because it can provide tutoring with school personnel and that the Student does not need the type instruction provided at Sylvan.

The first step in determining whether the School System should be forced to pay for Sylvan Learning Center tutoring to determine whether the School System's program was inappropriate[1]. The fact that the Parent disagrees with the program or would have preferred another program is not the test in determining whether the program is reasonably calculated to provide meaningful educational benefit. In Cypress -Fairbanks Ind. Sch. Dist. v Michael F., 118 F. 3d 245 (5th Cir. 1997), the 5th Circuit identified four

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[1] Both the Parent's expert, Dr. Weiss, and the School System's expert, Dr. Oakland, testified that Sylvan Learning Center was not an appropriate program for the Student. The Student and Parent both testified that Sylvan Learning Center substantially assisted the Student's reading and they believe such was helpful. Mary Lou Lane of the Star Center recommended tutoring at Sylvan Learning Center or at the PACE program at the University of Tennessee at Martin. The one subject where the Student performed above his abilities was in reading. Based on the Student's reading scores and testimony of Ms. Lane, the Parent and the Student, I find that the Student benefitted by the instruction provided by Sylvan Learning Center.

factors to be considered in determining whether an IEP is reasonably calculated to provide meaningful educational benefit. These factors include (1) whether the program was individualized on the basis of the student's assessment and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided and coordinated in a collaborative manner by the key "stakeholders"; and (4) whether the positive academic and non academic benefits are demonstrated.

The Student's IEP was individualized to meet his unique needs. The Student had numerous evaluations which established that his intellectual functioning was in low average range, he suffered from dyslexia and Touretts Syndrome. To accommodate his disabilities the School System has provided tutoring; classroom accommodations such as lap top computers; note taking for the Student; extended time for test and assignments; shortened tests and assignments; word banks; oral testing; group work; and an assignment notebook. In the Student's 9th grade year, in an effort to accommodate the mother's request for Sylvan Learning Center, the School System attempted to set up a program similar to Sylvan Learning Center. The School System personnel investigated the program at Sylvan; however, Sylvan Learning Center considers its program to be copyrighted and provided little information regarding the program. In fact, even during the depositions taken in this proceeding, Sylvan Learning Center refused to produce their materials. From the information the School System was able to obtain, the School System purchased the Steck-Vaughn curriculum which it believed to be similar to the materials used by Sylvan Learning Center. The School System assigned, Sheila O'Briant, to provide the tutoring. The Student testified that

Mr. Lynn Tucker, the Special Education Director, said that if the school tutoring did not work out he could go to Sylvan. The Student stopped attending the tutoring after three sessions. The Student testified that he quit the tutoring program because he was frustrated that the Steck - Vaughn material was for the first grade level and he reads at the sixth grade level. However, the records from the purchase of the Steck - Vaughn material and testimony of Mrs O'Briant establish that the materials were for the 5th and 6th grade level. The School System contacted the Parent about the Students attendance and was told that the Parent could not get the Student to attend. The Student has given no reasonable basis for not attending the School systems tutoring program. Perhaps he thought by not attending the School Systems program the program was not working out and the School System would pay for Sylvan. The School System provided additional tutoring to the Student. The Student chose not to participate in the School Systems program.

The School System is not required to contract with a private contractor to provide services to its students if it can provide the services with its own personnel. The IDEA provides:

> [T]his part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school of facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
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> 20 U.S.C. § 1412(a)(10)(C).

In this case, the School System was justified in offering the tutoring services through its personnel rather than contracting with Sylvan Learning Center. The choice is highlighted by the fact that Sylvan Learning Center does not disclose it's teaching method, did not have special education certified teachers on staff and the fact that sending the Student to an educational location that required a two hour round trip drive from his home would have violated the least restrictive environment requirements of the IDEA.

The United States Supreme Court in Rowley opined that the "IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Rowley at 203-204.

After reviewing all the testimony and exhibits the School System has met its burden in developing an educational program that is reasonably calculated to provide educational benefit. The Student has been provided with tutoring and numerous classroom accommodations and modifications. The Student has passed from grade to grade. The Student is within seven points of passing his TCAP test to allow him to graduate from high school. His only failing grade was in Algebra I, a class where it was extremely questionable to place this student during his sophomore year. The undisputed testimony from the Student's teachers was that the Student was not ready for Algebra I and that he should have been in a foundations math class. Unquestionably some of the Students success can be attributed to the extra help the mother provided, however, it is clear that the School System has provided a

serviceable Chevrolet as described by the Sixth Circuit Court of Appeals in Doe, supra. A more comprehensive program would certainly maximize this student potential but unfortunately maximization is not required under IDEA. The School System has provided the basic floor of opportunity required by the IDEA. See, Doe V. Alabama State Dept. of Educ., 915 F.2d 651 (11th Cir. 1990). Therefore, the School Systems has complied with the Rowley standard.

The Parent has asserted that the School System committed procedural violations in developing and implementing the IEP. The Parent contends that Mr. Tucker the Special Education Director controlled the IEP Team and that he refused to consider Sylvan because of cost. The Parent has also pointed out that the School System did not always record the Students progress on the goals' sheet of the Students IEP.

Procedural violations must be analyzed in view of whether any actual harm results. The Sixth Circuit has ruled that procedural violations, which do not cause a corresponding substantive violation, do not violate IDEA. Where the parents are afforded the opportunity to participate in the IEP process, minor or technical procedural violations of the Act have no impact. See, Doe V. Defendant I, 898 F.2d 1186 (6th Cir. 1990)

Based upon the testimony, there appears to be an undercurrent that certain services that are expensive are not suggested by the school system personnel at IEP Team meetings. Particularly disturbing was the testimony by Ms. Wanda Partee that she knew not to make certain recommendations in IEP team meetings because they "won't fly." Clearly the School System is not required to hire a private contractor to

provide services when it can provide the services with its' personnel. The problem in this case is that the undercurrent that the school will not consider expensive services is that even when the School System was providing appropriate services, it creates the perception to the Parent that the reason the Student is not receiving the services the Parent desires is because of funding. This creates distrust between the Parent and the School System personnel and greatly inhibits the working relationship between the School System and the Student. The perception problem is particularly troublesome when the requested service is something the School System is not required to provide under IDEA, ie. a private contractor to provide services that the School System can provide with its personnel. In this case the School System had provided Sylvan in the past, offered tutoring through its personnel and was not legally obligated to provide Sylvan, therefore, no harm has resulted in this case from any perceived or actual reluctance on the part of the School System to fund expensive programs.

The failure to document progress on the goal sheets did not result in any harm. Testimony established that school personnel were fully aware of the Students level of progress based the constant interaction between the school personnel and the Student. Furthermore, the Student was in the regular education program where he took tests and handed in homework which kept his teachers apprized of his progress.

B. Lindamood Bell methodology

In the Parent's pre-hearing brief, the Parent indicated that she was requesting Lindamood-Bell training for the Student. Parent's expert, Dr. Weiss, stated that the Lindamood-Bell program was developed in the mid-30s and was designed to increase the phonemic awareness of the patient. Dr. Weiss testified that she was qualified to

teach the program but did not actively provide training to her patients. Apparently the only person in Tennessee who provides Lindamood-Bell therapy is Terri Kendall. Ms. Kendall has no formal college training as a teacher or healthcare provider. She underwent training to provide Lindamood-Bell therapy in order to provide the therapy to her child. There are a numbering of troubling factors regarding the proposal for the Lindamood-Bell therapy. Although the therapy was developed in the 1930s, only one person in Tennessee provides the therapy. This therapist is not a teacher nor does she have special training as a healthcare provider other than to provide Lindamood-Bell therapy for her child. This raises the question that, if this is such a widely recognized and successful therapy, why isn't there more than one individual in the State to provide this therapy? The second factor that makes this proposal troubling is the fact that no other healthcare provider has recommended such therapy. The Student has been evaluated by numerous professionals including Donald J. Eastmeade, M.D., pediatric neurologist; Roy D. Greenburg, Ph.D., a licensed psychologist; Gerald M. Fenichel, M.D. professor of neurology; Dr. Barbara Olsen; the West Tennessee Special Technology Access Resource Center; Dr. Jim Levernier, behavioral and development specialist; Kimberly Hinton, Ph.D.; Lynn Zager, clinical psychologist; David A. Kube, M.D., assistant professor of development pediatrics and Kathy Philyaw M.D.. Not one of these mental health or medical practitioners has recommended Lindamood-Bell therapy. The final troubling aspect of the Lindamood-Bell proposal is that it was raised within days of the due process hearing. There has been no IEP team meeting, in which all of the professionals involved in the Student's education can evaluate whether Lindamood-Bell would be an appropriate program for the Student. The Lindamood-Bell

program is essentially an educational methodology. The choice of educational methodology is a matter of discretion within the authority of the school personnel. The Supreme Court stated in the Rowley case that "the primary responsibility for formulating the education to be afforded a handicapped Student and for choosing the educational methodology most suitable to the Student's needs, was left by the Act to State and Local agencies in cooperation with the parents or guardians of the Student." Rowley, supra 458 U.S. @ 207. One of the leading cases on methodology is Lachman v Illinois State Board of Education, 852 F. 2d 290 (7th Cir. 1988), cert . denied, 488 U.S. 925 (1988). Lachman involved a dispute between parents and a school district over how best to educate a deaf child. The parents favored a "cued speech" methodology that trained the child to understand spoken language. The district recommended a "total communication" approach in which the child would have relied primarily on sign language. The court found that the district's proposed placement using total communication "satisfied IDEA"; therefore, the court ruled that the parents could not force the school district to adopt what they perceived to be an even more efficient educational program. The court observed "once it is shown that the Acts requirements have been met, the question of methodology is for resolution by the responsible authority."

The Sixth Circuit, applying Lachman, adopted the view that the parents are not entitled to dictate educational methodology or to compel a school district to supply a specific program for a disabled child. Rather, the court held that school districts have discretion over methodology decisions. Tucker v Calloway Bd. of Educ., 136 F. 3rd 495 (6th Cir. 1998). In this case, the School System has provided special education

services which have allowed the Student to pass courses from year to year. The Student is within seven points of passing the TCAP examination in order to allow the Student to graduate. The program offered by the School System certainly cannot be characterized as failing to provide FAPE.

Although the Parent may feel that the Lindamood-Bell program provides better educational services to the Student than what is being offered by the School System, the IDEA does not require that the School System provide or pay for such a program.[2]

ORDER

It is therefore ordered, adjudged and decreed that the School System is the prevailing party.

This decision shall be binding upon both parties unless the decision is appealed. Any party disagreeing with this decision may appeal to the Chancery Court of Davidson County, Tennessee or seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within 60

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[2] I specifically want the Parents to know that I do not criticize their choices in providing additional educational opportunities for their Student. If this were my child, I would have undertaken to obtain additional services for him; however, the statute does not require that the School System maximize the Student's potential; therefore, even though additional services may be beneficial once the School System has met the threshold level of educational services, nothing more is required by IDEA of the School System.

days from the date of entry of a final order in a non-reimbursement case or 3 years involving educational costs and expenses. In the appropriate cases, the reviewing court may order that the final order be stayed pending appeal.

James Stephen King
Administrative Law Judge
1661 International Place Drive, #300
Memphis, TN 38120
(901) 767-1234

JAMES STEPHEN KING
ADMINISTRATIVE LAW JUDGE

DATED: August 28, 2000

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document has been sent by postage prepaid mail, this the 28th day of August, 2000, to the Gibson County School System and the Student.

James Stephen King